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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT.

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ESTATES IN FEE TAIL.—Quite generally estates in fee tail under the STATUTE DE DONIS were recognized by the states as a part of the common law. Statutory provisions in the way of modification and abolishment of such estates, however, are very common. The nature and scope of the statutory provisions have varied. See the states classified according to the character of the legislation in BREWSTER, CONVEYANCING, § § 142, 143.

In *Ewing v. Nesbitt*, 88 Kans. 708, 129 Pac. 1131 (1913), commented upon in 11 MICH. LAW REV., 534, the court was called upon to consider the nature and incidents of an estate in fee tail in Kansas. There was no statute on the subject, and the court therefore held that the estate could be created there as at common law. But since the common law methods of barring the entail were inconsistent with their modes of procedure, an ordinary deed of conveyance properly executed would accomplish the same result.

In some states the statutes have expressly provided that a conveyance by the tenant in tail duly executed (sometimes with special formalities), shall have the effect of barring the entail. See, for example, MASS. REV. LAWS, 1902, ch. 127, § 24; REVISED CODE OF DELAWARE (1893), chap. 83, § 27, PURDON'S DIGEST (PA.), 1483-1485. In Delaware, statutes further provide that the grantee in any deed made by the proper officers pursuant to execution

process "shall hold the premises therein conveyed with all their appurtenances, as fully and amply, and for such estate and estates, and under such rents and services, as he or they, for whose debt, or duty, the same shall be sold, might or could do, at or before the taking thereof in execution." REV. CODE (1893), ch. III, § 27.

In *Hazzard v. Hazzard*, 5 Boyce—, 94 Atl. 905 (1915), noted in 15 COLUMBIA L. REV., 618, lands devised in fee tail, with remainder over, were sold on execution on judgment against the tenant in tail and sheriff's deed given therefor. After death of the execution debtor, the remainderman sued in ejectment to recover possession from the grantee of the grantee in the sheriff's deed. The court held, under the provisions of the statutes above referred to, that the grantee in the sheriff's deed took a fee simple. The court concluded that, under the statutory provision above quoted, the purchaser took such *estate or estates as the debtor might or could convey*. The Supreme Court of Delaware has now reversed that judgment, holding that the purchaser at execution sale gets only an estate for the life of the tenant in tail. *Hazzard v. Hazzard*, 97 Atl. 233 (1916).

The conclusion of the court is supported by *Elliott v. Pearsoll*, 8 Watts & S., 38 (1844), PURDON'S DIGEST (1818), 199, containing a provision similar to the Delaware statute, and the construction of the statute would seem to be sound despite the unfortunate results. Under this decision there is available in Delaware a very effective means of keeping land out of the reach of creditors, except for the limited interest as appears above, a means almost as effective and pernicious as the tenancy by entireties, at least as the same is worked out in Michigan.

Another interesting case showing that the often supposed obsolete estate tail is still of very considerable importance is *Dungan v. Kline*, 81 Oh. St. 371, 90 N. E. 938 (1910), from which it appears how land in Ohio may be entailed for one generation.

R. W. A.

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TAKING OF EQUITABLE EASEMENTS FOR PUBLIC USE.—The case of *Flynn v. New York &c Railway Co.*, decided by the Court of Appeals of New York in April last, involves the right of an owner of land to which is appurtenant a so-called equitable easement, arising under a covenant restricting the use of other land, to compensation upon the taking of the servient land for a public use inconsistent with the restriction. A tract of land was laid out in accordance with a plan, and all lots therein were sold and conveyed by deeds containing covenants, *inter alia*, that, "No building or structure for any business purpose whatsoever shall be erected on said premises." The appellant railway company purchased thirty-eight of these lots from the grantees of the original owner, subject to the restrictions, and built its railway across them, partly on an embankment and partly in a cut. Respondents owned lots in this tract, some adjacent to appellant's lots, some across the street from them. The maintenance and operation of the railway rendered respondents' property less valuable than it would be if the appellant's property were used exclusively for residence purposes. The